Moreover, looking broadly at the arrangements set out in the document, the terms seem so vague and uncertain that it must be seriously doubted whether there was any intention to create a legal relationship thereby. See *Jones* v. *Padavatton*[2]. As Lane J. said recently in *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers*[3], that "without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour." It is true that the defence does not plead this specifically but by paragraph 3 of defence the respondent does deny that there was an agreement of transfer. Nevertheless the onus of showing that the agreement was binding rested with the appellant.

Another aspect of the agreement may have to be looked into. To what extent would the existence of the deceased's daughter who was not a party to the agreement affect the agreement. This point was not raised by the defence for a good reason. That is the existence of the deceased's daughter does not affect the agreement in any way. The deceased's daughter is married to one Lai Yin Seng. I think both counsel are aware of the extent to which Chinese customary law is applicable in Sarawak. This has been expounded with lucidity by Dr. Hedges, then Chief Justice of Borneo in *Chan Bee Neo & Ors.* v. *Ee Siok Choo*[4] where the appellant unsuccessfully challenged the validity of a will as being contrary to Chinese customary law. In that case it was laid down that the court will apply Chinese customary law where the custom in question is expressly regulated by a Sarawak Ordinance or by rules made under an Ordinance, or where the custom is recognised, either expressly or by necessary implication, in a Sarawak Ordinance. As regards the law of inheritance, the Chinese customary law of succession on intestacy has long been recognised by Sarawak courts. Thus section 17 of the Administration of Estates Ordinance (Cap. 80) (which was omitted from the 1958 revised edition of the Laws of Sarawak but is still in force and to be found in Vol. III of the 1947 revised edition of the Laws of Sarawak) charges the administrator to distribute the estates among the heirs of the deceased "in the shares to which they are entitled by recognised law or custom." By implication this has been accepted as including Chinese customary law. The underlying principle of Chinese customary law of intestate succession would seem to be that on the death of the parent the persons entitled to the family property are all the sons and the male descendants, regardless of whether they are sons of the primary or secondary wives. Where the deceased left a widow and daughters then those sons who share the property would be responsible for the support of their mother until her death, and sisters until their marriage or earlier death. I find support in the case of *Tay Sok Ann* v. *Tay Sok Hiong & Anor.*[5] where the validity of a will was contested. There Blagden J. observed: —

"In my view, as this is a Chinese Estate, any proved or accepted Chinese custom in Sarawak should prevail over English law. This is apparent from the proviso to section 2 of the Application of Laws Ordinance (No. 27 of 1949). From the evidence available to the Court I am satisfied that there is accepted Chinese custom in Sarawak relating to the descent of property on an intestacy, and that custom is that the property of the deceased is divided equally between the sons, who become responsible for the support of their mother until her death and their sisters until their marriage or earlier death."

This has always been recognised as the Chinese customary law of intestacy in Sarawak. It can create a problem where a man dies leaving a wife and daughters and brothers. The Sarawak Administration of Estates Ordinance was enacted in 1933 and if I may say so is clearly archiac and unsatisfactory to present day conditions. The Probate and Administration Ordinance (Cap. 109) of Sabah is more progressive. Again in Sabah under the Intestate Succession Ordinance, 1960 certain rules of distribution are laid down. Thus if a person died intestate leaving a wife and children, the wife is entitled as of right to one-third of the estate and the other two-thirds of the estate is to be shared equally among the children.

In praying for specific performance the appellant is seeking a discretionary remedy. He has now moved to another house which he has built on the portion of land he believed to be transferred to him absolutely. My sympathy is with the appellant. But I do not have the same advantage as the learned judge in assessing his credibility. Of the appellant the learned judge has this to say,

"The plaintiff appears to be prepared to say that which suits his case. For example his evidence as to the articles removed from the land: he says first that he did not know they were not mentioned in the agreement (para. 5) which only allowed him to remove certain specific things, secondly that they were bought by him and finally he admitted that they were for the most part bought by the deceased. He was clearly not entitled to remove them and to do so was a breach of the agreement."

In my judgment the learned judge was right on the particular facts of the case to hold that the respondent intended to give a portion of the land for the appellant's use during his lifetime. The respondent has not resiled from his word. In fact he has not interfered with the appellant's enjoyment of the land. The respondent's counsel has indicated that he will undertake to draft the necessary papers to ensure that the appellant's right is protected. Since this undertaking has been given, it is not necessary to add a recital to the order which the court may make that the respondent conceded that under the agreement the appellant was entitled to a life interest in that portion of the land as demarcated.

For reasons given the appeal is dismissed with costs.

Appeal dismissed.

E. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[F.C. (Azmi L.P., Suffian Ag. C.J. (Malaya) and Gill F.J.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 99 of 1969]

Income Tax — "Trade" or "business" — Whether isolated sale of land is trade or business — Transaction an ad-

venture in nature of trade but not taxable as it was not a trade or business — Income Tax Ordinance, 1947, s. 10(1)(a).

Practice and Procedure — Income tax — Appeal by way of case stated — Procedure — Income Tax Ordinance, 1947.

In this case the appellant had purchased, jointly with four other persons, a rubber estate near Seremban for the price of $197,837.60. Subsequently the co-purchasers of the estate negotiated for the sale of the estate to a company, one of whose objects was the development of land into housing sites. The estate was eventually transferred to the company in consideration of the company issuing fully paid up shares to the value of $765,000. For his share in the estate the appellant became entitled to shares to the value of $382,500. The Comptroller of Income Tax assessed the appellant to additional assessment in respect of the amount representing the excess of the value of the shares in the company to which the appellant became entitled over the amount of his share of the purchase price of the land, on the basis that this amount represented profit from business chargeable to income tax under section 10(1)(a) of the Income Tax Ordinance, 1947. The appellant appealed against this additional assessment to the Special Commissioners of Income Tax but his appeal was dismissed. He then appealed to the High Court by way of case stated and again he was unsuccessful. He then appealed to the Federal Court.

Held, allowing the appeal: the transaction by the appellant in this case was an isolated transaction and although it was an adventure in the nature of trade, it did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it was a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of that section. The profit arising therefrom was therefore not subject to tax under the section.

Cases referred to:-

(1) *Manchester Corporation* v. *Sugden* [1903] 2 K.B. 171, 173.

(2) *Commissioners of Inland Revenue* v. *Tootal Broadhurst Lee Co. Ltd.* 29 T.C. 352, 361.

(3) *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259.

(4) *R.* v. *Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, 51.

(5) *R.* v. *Barnsley Licensing Justices* [1960] 2 Q.B. 167, 187.

(6) *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* [1968] 3 W.L.R. 694, 707.

(7) *Californian Copper Syndicate* v. *Harris* 5 T.C. 159.

(8) *Eames* v. *Stepnell Properties Ltd.* [1967] 1 W.L.R. 593.

(9) *Rutledge* v. *Commissioners of Inland Revenue* 14 T.C. 490.

(10) *Commissioners of Inland Revenue* v. *Livingston & Ors.* 11 T.C. 538.

(11) *Martin* v. *Lowry* 11 T.C. 297.

(12) *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* 12 T.C. 358.

(13) *Commissioners of Inland Revenue* v. *Fraser* 24 T.C. 498.

(14) *Edwards* v. *Bairstow & Harrison* 36 T.C. 207.

(15) *Leeming* v. *Jones* 15 T.C. 333.

(16) *Tebrau (Johore) Rubber Syndicate, Ltd.* v. *Farmer* 5 T.C. 658.

(17) *Cooksey and Bibbey* v. *Rednall (Inspector of Taxes)* 30 T.C. 514.

(18) *Pearn* v. *Miller* 11 T.C. 610, 614.

(19) *D.E.F.* v. *Comptroller of Income Tax* [1961] M.L.J. 55.

(20) *D.R. Fraser & Co. Ltd.* v. *Minister of National Revenue* [1949] A.C. 24, 33.

(21) *In re Samuel* [1913] A.C. 514, 526.

(22) *Pickford* v. *Quirke* 13 T.C. 251, 269.

(23) *Commissioners of Inland Revenue* v. *Reinhold* 34 T.C. 389, 392.

(24) *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (1928) 41 C.L.R. 148, 151.

(25) *Commissioners of Inland Revenue* v. *Hyndland Investment Co. Ltd.* 14 T.C. 694, 699.

(26) *Commissioners of Inland Revenue* v. *The Scottish Automobile and General Insurance Co. Ltd.* 16 T.C. 381, 390.

(27) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653.

(28) *Cotman* v. *Brougham* [1918] A.C. 514.

(29) *H.L. Bolton (Engineering) Co. Ltd.* v. *T.J. Graham & Sons, Ltd.* [1956] 3 All E.R. 624, 630.

(30) *Erichsen* v. *Last* 4 T.C. 422, 427.

(31) *Smith* v. *Anderson* (1880) 15 Ch. D. 247, 277.

(32) *Kirkwood* v. *Gadd* [1910] A.C. 422, 431.

(33) *Commissioners of Inland Revenue* v. *Marine Steam Turbine Co.* [1920] 1 K.B. 193, 202, 203.

(34) *St. Aubyn Estates, Ltd.* v. *Strick* 17 T.C. 412.

(35) *H. Co. Ltd.* v. *Commissioner of Income Tax* 1 East African Tax Cases 65.

(36) *Ormond Investment Co. Ltd.* v. *Betts* 13 T.C. 400.

(37) *Coltness Iron Company* v. *Black* 1 T.C. 287.

(38) *Jackson's Trustees* v. *Lord Advocate* 10 T.C. 460.

FEDERAL COURT.

Peter Mooney (*Ronald Yeo* with him) for the appellant.

Nik Saghir bin Mohamed Noor (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Gill F.J.: The appellant in this case is a rubber merchant and landed proprietor. Before the last war he acquired 7 lots of land at Sepang, which he sold in 1952. He bought 78 acres of land at Ulu Klang known as B Rubber Estate in 1949, which he sold in 1964. In 1951 he bought 187 acres of rubber land at Rawang, which he sold in 1960.

In or about December, 1957, jointly with four other persons, he entered into an agreement for the purchase at a price of $197,837.60 of a rubber estate known as D Estate, two miles from Seremban town. They completed the purchase on 28th February, 1958 and the land was registered as to one-half undivided share in the name of the appellant and as to one-eighth undivided share in the name of each of his four co-purchasers.

At the beginning of 1958 the co-purchasers of D Estate approached a firm of accountants with a view to forming a limited company to be known as the D Company Limited. On 19th September, 1958 the manager of D Estate, one of the co-owners, wrote a letter to the District Officer, Seremban, informing him of a scheme to develop 16 acres of the land for the erection of 20 bungalows and to ask whether there would be any objection to the scheme. No subdivision of the land was contemplated, as the intention was to build the bungalows for the purpose of renting to a certain organisation. Development of the housing site

commenced on receipt in March, 1959 of a definite undertaking from that organisation that the houses would be taken on lease. The land was levelled and drains, sewers and roads constructed at a cost of approximately $50,000.

The D Company Limited was incorporated and registered on 8th May, 1959. Prior to the date of such incorporation and registration the land had been valued by a licensed appraiser at $765,000. Soon afterwards, the appellant and his four co-owners transferred the land to the company in consideration of the company issuing fully paid up shares to the value of $765,000. For his half undivided share the appellant became entitled to shares to the value of $382,500 but he had himself registered as the owner of $10,000 shares only.

The appellant was one of the two subscribers to the memorandum and articles of association of the company. The objects of the company as set out in the memorandum of association, *inter alia*, were —

(a) To purchase or acquire land or lands with the object of laying out for building purposes, and to build on, improve let on building leases, advance money to persons building on, and otherwise develop the same, in such manner as may seem expedient to advance the company's interest.

(b) To develop and turn to account any land acquired by the company or in which it is interested, and in particular by laying out and preparing the same for building purposes, constructing, altering, pulling down, decorating, maintaining, fitting up, and improving buildings and conveniences, and by planting, paving, draining, farming, cultivating, letting on building leases or building agreement, and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants and others.

(c) To purchase for investment or resale and to traffic in land and houses and other property of any tenure and any interest therein and generally to deal in, traffic by hold and leasehold ground rents and to make advances upon the security of land or houses or other property or any interest therein and generally to deal in, traffic by way of sale, lease, exchange or otherwise with land and house property and any other property whether real or personal.

Building operations having commenced after the company was incorporated, the houses were completed in March, 1960, and they were let out on rent as from 8th May, 1960 with one year's rental of $78,000 having been received in advance. Two additional bungalows, each of two storeys, were built on the land in 1964, and they were also let out on rental. The rubber trees on the land matured for tapping in April, 1960 and they have been tapped ever since. The income from the rubber for the period April to December, 1960 was approximately $20,000. For the year 1967 the income was more than $19,000.

In respect of the amount representing the excess of the value of the shares in D Company Limited to which the appellant became entitled over the amount of his share of the purchase price of the land, the Comptroller of Income Tax by a notice of assessment dated 17th June, 1967 assessed the appellant for additional income tax for the year of assessment 1959, on the basis that this amount represented profits from business chargeable to income tax under section 10(1)(a) of the Income Tax Ordinance, 1947.

The appellant appealed against this additional assessment of income tax to the Special Commissioners of Income Tax, but his appeal was dismissed. He then appealed from the decision of the Special Commissioners to the High Court by way of case stated. Again, he was unsuccessful. He has now brought this appeal from a judgment of Chang Min Tat J. in the High Court delivered on 30th August, 1969.

Before dealing with the merits of the appeal, it will be convenient to dispose of two preliminary points each of which has been raised as a ground of appeal.

The first of these grounds relates to the refusal by the learned judge in the court below to admit an affidavit of the appellant dated 9th May, 1969 and another affidavit of one G.K.B. dated 7th May, 1969 for the purpose of the appeal before him. Counsel for the appellant complained in that court that his request for a copy of the complete notes of the evidence taken by the Special Commissioners was turned down and that the case stated was prepared without reference to him or his approval. It was argued that it would be impossible for the court to determine all the issues unless it had before it a complete record of the evidence taken by the Special Commissioners. The admission of these two affidavits was sought on the ground that they contained evidence which was before the Special Commissioners but had been omitted from the case stated. An application was therefore made that either the affidavits sought to be put in should be incorporated into the record or the case sent back to the Special Commissioners for amendment or for the finding in relation to such other facts to be stated as a supplementary case, under paragraph 40 of Schedule 5 to the Income Tax Act, 1967. In this connection, the attention of the court was drawn to the procedure followed in Great Britain, as stated in *Simon's* Income Tax, paragraphs 748 and 749 at pages 302-303.

Counsel for the respondent conceded that the case was stated without reference to the appellant. He also conceded that the court had discretion to order the inclusion of evidence under paragraphs 39 and 40 of Schedule 5 to the Income Tax Act, 1967. He submitted, however, that it was not the usual practice for a verbatim statement of the evidence to be set out in the case stated, as paragraph 37 of Schedule 5 required the Special Commissioners to set forth merely the facts as found by them. In this connection, he cited the following passage from *Halsbury*, 3rd Edn, Vol. 20, paragraph 1364 at page 691: —

"The case contains a statement of the facts and the determination of the commissioners. A finding of the facts is required, not a verbatim statement of the evidence without indicating plainly how far they accept or reject it; and it is not a convenient practice to attach the evidence to the case, because it is for the commissioners to find the facts. There should be a definite finding, not an approval of contentions. Commissioners should be careful to say that they 'find' a conclusion of fact arrived at from other facts found; or if they do not mean to drawn any conclusion of fact but to apply the law they should indicate their conclusion by saying that they 'hold' it. The most convenient arrangement of a case stated is to set out the facts in a series of paragraphs, followed by separate paragraphs showing the contentions of the parties and the commissioners' findings respectively. The statement of law upon which the court's opinion is sought

should be set out in the case. In cases where the commissioners have to deduce a conclusion of fact from primary facts admitted or proved before them, the question of law is whether the primary facts found or admitted can support the further conclusions of fact, and the point ought to be so stated."

On going through the affidavits the learned judge ruled that they contained evidence which it was not within his province to hear. He was further of the opinion that the appellant's income from Rawang and B rubber estates as set out in the affidavits was not relevant to the appeal before him, and that as far as the income from D Estate after its sale to the company was concerned it was incorporated in summary form in the facts as found by the commissioners. In the circumstances, he did not consider that any useful purpose would be served by remitting the case to the commissioners, and he also ruled against the admission of the affidavits. In my opinion, the two affidavits were rightly rejected, because they contained evidence some of which was not before the commissioners, and I entirely agree that no useful purpose would have been served by remitting the case to the commissioners either for the case to be amended or for a supplementary case to be put up. That disposes of the first point.

Notwithstanding what I have said, I agree with the suggestion made by counsel for the appellant that as no clear-cut procedure has been laid down in Schedule 5 in relation to an appeal from the Special Commissioners to the High Court, this court should give some indication as to the practice which should be followed in the future. It is clear that the law relating to such appeals is similar to the law in England in relation to similar appeals as contained in section 64 of the Income Tax Act, 1952 and the earlier Acts. Reference to the practice followed in England is made in the following passage in the judgment of Collins M.R. in *Manchester Corporation* v. *Sugden*[1]:

"There can be no doubt whatever that, under the modern practice at all events (and it seems to me to be a very convenient practice), the parties interested in the case are allowed or invited to see the case in its proposed form, and are then allowed or invited to make suggestions and amendments upon it. It seems to me that it is very desirable that this should be done, because cases of this kind are usually complicated and often involve large sums of money; and if a case when stated does not come in the final form to a hearing on the real points which the parties desire to try, the only alternative is that the Court has to send it back again, and that involves a good deal of expense."

Somervell L.J. in *Commissioners of Inland Revenue* v. *Tootal Broadhurst Lee Co., Ltd.*[2], after referring to the usual practice of a case being sent for correction first to the successful party, then to the unsuccessful side and then back to the commissioners, said: "They do not necessarily adopt, of course, but consider any suggestions for amendment that have been made."

The passage in *Simon's* Income Tax, (1964-65) Edn, Vol. 1, paragraph 749, page 304, on which counsel for the appellant based his argument in the court below that the case stated did not contain a complete record of the facts, reads as follows: —

"After a stated case has been drafted it is normally sent first to the successful party for him to suggest such alterations, additions or amendments as he may think fit. At this stage the taxpayer will do well to consult his solicitor, if he has not already done so. The stated case is the document on which the Court will found its opinion, and it ought to be professionally settled. When the draft is returned to the commissioners, they send it for the same purpose to the other party, and on its return from him the commissioners stating the case decide its final form, and state and sign it and forward it to the party who required the case to be stated. The case then comes to the Commissioners as agreed or indicating the disagreement, and is put into its final form, for which the Commissioners are solely responsible. In practice, however, at the discretion of the commissioners, the terms of the case are occasionally agreed between the parties, the proposed appellant drafting the statement and obtaining the agreement or otherwise of the other side. Whether the case is drafted by agreement between the parties or by the commissioners in the first instance, it is usual for those advising taxpayers to consult counsel on the draft before it is finally settled. Much may depend on the form of the case. Care should be taken that all the facts upon which the party revising the case intends to rely are clearly stated as proved at the appeal, and that the result of any effective cross-examination is faithfully reproduced. It is worth while framing one's contentions carefully. They ought not, of course, to go outside what was said at the appeal, but within these limits a party is usually given a free hand in settling the wording of his own contentions."

I believe it is well within the province of this court to direct that that practice should be followed, and I would make a direction accordingly. It is an admirable practice and, if followed, there will seldom arise the necessity for a court to order the case to be remitted to the commissioners in order to put right the case stated.

The ground of appeal on the second preliminary point, as I have called it, is that the chairman of the Special Commissioners who was at the material time Adviser to the Inland Revenue Department, irrespective of whether he had or had not advised specifically on the case, should not have sat as chairman of the Special Commissioners. This ground is based on the general legal principle that a man is disqualified from sitting in a judicial capacity when he has a "direct pecuniary interest" in the subject-matter or is "biased" in favour of one side or against the other, but it has not been suggested that the chairman in the present case had any direct pecuniary interest in the subject matter of the appeal.

So far as "bias" is concerned, there is the oft-repeated saying of Lord Hewart C.J. in *Rex* v. *Sussex Justices, Ex parte McCarthy*[3] that justice should not only be done, but should manifestly and undoubtedly be seen to be done, on the basis of which the courts in England have often quashed decisions on the strength of the reasonable suspicion of the party aggrieved, without having made any finding that a real likelihood of bias existed. This has come to be known as the "reasonable suspicion" test. In *Reg.* v. *Camborne Justices, Ex parte Pearce*[4], however, the Divisional Court of the Queen's Bench Division held that "real likelihood" was the proper test, and that "a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries." There would appear to be some doubt as to whether the Divisional Court, by approving the "real likelihood" test, intended to dis-

approve the "reasonable suspicion" test, but that doubt was resolved by Devlin L.J. in *Reg.* v. *Barnsley Licensing Justices*[5] when he said that whether a real likelihood of bias existed was to be determined on the probabilities to be inferred from the circumstances, not upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large. In *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon*[6] Lord Denning said that, although Devlin L.J. appeared to have limited the "reasonable suspicion" test considerably, he would stand by it because the court must look at the impression which would be given to other people.

S. A. de Smith on Judicial Review of Administrative Action, second edition, at page 246 says:

"In so far as the 'real likelihood' and 'reasonable suspicion' tests are inconsistent with each other, it is submitted that the former is normally to be preferred; the reviewing court should make an objective determination, on the basis of the whole evidence before it, whether there was a real likelihood that the inferior tribunal would be biased. That members of an independent tribunal are likely to have been biased is a serious allegation. The public interest will seldom be served by relaxing the conditions under which it may be successfully made. Nevertheless, there is a case for leaving the courts with a discretion to apply the 'reasonable suspicion' test in relation to criminal proceedings and proceedings analogous to the criminal, where the impression created on the defendant's mind may be regarded as being of paramount importance."

The learned author says this in relation to the "real likelihood" test at page 245:

"The test of real likelihood of bias, which has been applied in a number of leading cases in magisterial and liquor licensing law, is based on the reasonable apprehensions of a reasonable man fully apprised of the facts. It is no doubt desirable that all judges, like Caesar's wife, should be above suspicion; but it would be hopeless for the courts to insist that only 'people who cannot be suspected of improper motives' were qualified at common law to discharge judicial functions, or to quash decisions on the strength of the suspicions of fools or other capricious and unreasonable people."

In the present case, there is nothing to suggest that the chairman was likely to be biased. It is true that at one time he was the legal adviser to the Department of Inland Revenue, but it is common ground that he was no longer connected with the department when the proceedings were commenced before the commissioners. Counsel for the respondent speaking from the bar said — and this was not contradicted by the other side — that counsel for the taxpayer had seen the comptroller regarding the matter and had been given an assurance that the chairman of the Special Commissioners had given no legal advice in relation to the assessment against which this appeal has been brought. He further pointed out that all legal advisers to the Department of Inland Revenue are responsible only to the Attorney-General on whose behalf they give legal advice to the department, and that they work in the department of the respondent merely for the sake of convenience. To apply the "reasonable suspicion" test to the present case would lead to the startling proposition that no legal officer who at some time or other has acted in an advisory capacity to the Department of Inland Revenue can ever qualify to sit as a chairman of the Special Commissioners. In the peculiar circumstances of this case, the only test to be applied is the "real likelihood" test which is based on the reasonable apprehensions of a reasonable man fully apprised of the facts. It is also to be observed that this point was not taken before the learned judge in the court below, but quite apart from that, I do not think there is anything to it. I must therefore reject this ground of appeal.

Coming to the merits of the appeal, section 10(1)(a) of the Income Tax Ordinance, 1947, under which the appellant was held liable to pay additional income tax for the year of assessment 1959, provides as follows: —

"10. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised."

The corresponding and relevant provision in section 122, Schedule D of the English Income Tax Act, 1952 speaks of the annual profits or gains arising or accruing from "any trade, profession, employment or vocation exercised within the United Kingdom". Section 526 of the English Act defines "trade" to include "every trade, manufacture, adventure or concern in the nature of trade", and there is a similar definition in the earlier Acts. There is, however, no definition of "trade" or "business" in our Ordinance. Moreover, the word "business" and the added words "for whatever period such trade, business, profession or vocation may have been carried on or exercised" do not appear in the English Acts. These differences in the two legislations have to be borne in mind when considering the present case in the light of the English decisions which were cited by both parties at the hearing of the appeal.

In dealing with the appeal before them the Special Commissioners of Income Tax first considered the question as to whether the transfer of property in exchange for shares can be treated as if it were a transaction of selling property for money and whether the excess of the value of the shares over the cost of the property could be taken as a profit. They answered this question in the affirmative on the authority of *Californian Copper Syndicate* v. *Harris*[7]. This part of their decision was not seriously challenged in the High Court and there is no appeal against it before us, although it has been argued that in selling his undivided half share in the land for shares in the company the appellant merely converted capital in one form into another form.

The second question which the Special Commissioners considered was whether in purchasing and selling D Estate the appellant was carrying on a trade in buying and selling land so as to be liable to income tax for the profits which he made on such trading. It was contended on behalf of the appellant that this being an isolated transaction it was not even an adventure in the nature of a trade, and that even if the transaction was an adventure in the nature of a trade the profit therefrom was not assessable to income tax

under our law which, unlike the English statutes, does not define "trade" to include an adventure in the nature of a trade. The Special Commissioners agreed with the contention that an adventure or concern in the nature of trade is not a trade within the meaning of section 10(1)(a) of our Ordinance, and were therefore of the opinion that it was irrelevant to consider whether the transaction in question was an adventure in the nature of trade.

It is not quite clear from the judgment of the learned judge in the High Court whether he agreed with the Special Commissioners on this point because he appears to have regarded the transaction as trading in land. This is what he said in his judgment in relation to this point:

"Put simply, the appellant had bought a rubber estate. He had transformed it, or at least a part of it, into a housing estate, and had sold it as such at a greatly enhanced price. That in my view is plainly trading in land. He might have saved himself some taxes by separating the sale of the housing estate from the rubber land. This he did not do. It is now impossible to separate the two. He could not therefore escape the assessment on the basis of the sale of the whole of the land."

He then went on to refer to the case of *Eames* v. *Stepnell Properties Ltd.*[8] which he thought would have been of much more assistance to the Special Commissioners. With respect, the acquisition of land in that case with the intention and in the expectation of selling it to the local authority at a profit was held to be an adventure in the nature of a trade, so that yet another English case of an adventure in the nature of trade would have been of no assistance to them. The Special Commissioners, in my judgment, had correctly decided that an adventure in the nature of a trade is not taxable under our law. I am therefore compelled to say, with all respect to the learned judge, that he was wrong in dismissing the appeal on the basis that the transaction in question, by reason of its being an adventure in the nature of trade, amounted to trading in land so as to make the profits therefrom liable to income tax under our law.

The appellant is not quarrelling with the way in which the Special Commissioners answered the second question which they put to themselves. But since arguments were addressed and numerous authorities cited to us on the question as to whether the transaction in the present case would be an adventure or concern in the nature of trade under the English Income Tax Act, 1952, it would be useful to deal with the point, particularly when the learned judge disposed of the appeal on that basis.

Whilst a trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling or manufacturing and selling, in view of the definition of "trade" in the English Income Tax Act which I have mentioned above, the mere fact that there is only one transaction does not preclude the possibility that that transaction is in the nature of a trade. Thus, one single purchase and sale or one purchase and many sales have been held in the English and Scottish courts to be trading (see *Halsbury*, 3rd edition, Vol. 20, paragraph 213, page 119).

To take but a few of those decided cases, in *Rutledge* v. *Commissioners of Inland Revenue*[9] the appellant was a moneylender who was also in 1920 interested in a cinema company. He had since that time been interested in various businesses. Being in Berlin in 1920 on business connected with the cinema company, he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and, within a short time after his return to the United Kingdom, sold the whole consignment to one person at a considerable profit. It was held that the profits in question were liable to assessment to income tax as being profits of an adventure in the nature of trade. Lord President Clyde giving his opinion in the Court of Session said at page 497:

"It is no doubt true that the question whether a particular adventure is 'in the nature of trade' or not must depend on its character and circumstances, but if — as in the present case — the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was 'in the nature of trade', though it may be wholly insufficient to constitute by itself a trade."

In *Commissioners of Inland Revenue* v. *Livingston and Others*[10], the respondents, a ship repairer, a blacksmith and a fish salesmen's employee, purchased as a joint venture a cargo vessel with a view to converting it into a steamdrifter and selling it. They were not connected in business and they had never previously bought a ship. Extensive repairs and alterations to the ship were carried out by the orders of the respondents, the first two of them being employed thereon in their ordinary capacity and at the ordinary trade rates. Having converted the cargo vessel into a steamdrifter they sold it at a profit. It was held that they were assessable to income tax in respect of the profit arising on the transaction. Lord President Clyde said at pages 542 and 543:

"If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture which took only three months to complete. The respondents began by getting together a capital stock sufficient (1) to buy a second-hand vessel, and (2) to convert her into a marketable drifter. They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end, these operations seem to me to be the same as those which characterise the trade of converting and refitting second-hand articles for sale. It may be that, in commercial practice relative to ships, this kind of business is not usually followed separately from the general business of shipbuilders and ship-repairers. But, even so, I think it is none the less 'in the nature of trade'. The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased

of money laid out upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade."

In *Martin* v. *Lowry*[11] a wholesale agricultural machinery merchant who had never had any connection with the linen trade purchased from the Government the whole of its surplus stock of aeroplane linen and subsequently sold it in small lots to more than a thousand purchasers. It was held that his dealings in linen constituted the carrying on of a trade of which the profits were chargeable to income tax. Rowlatt J. in the course of his judgment in the High Court said at page 309:

"He bought this gigantic consignment of linen, and he set to work to make people (he did not care who they were) come in and buy it; to induce them to come in and buy it, and he set to work and worked away at it, got offices, did this, that and the other, and worked away at it so as to persuade people and make people think that it was to their advantage to come in to buy, some more and some less, and they bought it all, and all this is profit. Why is not that a trade?"

In *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue*[12] the appellants, three members of certain firms engaged in the wine trade, formed a syndicate, independent of their respective firms, with a view to acquiring as a speculation a quantity of brandy from the Cape Government for subsequent sale on their joint account. The brandy was bought in three instalments through an agent in Cape Colony, the appellants being unaware in the first instance of the total quantity available. A small quantity of the brandy was sold by the agent on commission and the balance was shipped to the United Kingdom, blended by the members' firms with French brandy purchased by the syndicate, and re-casked and sold in numerous lots by those firms on behalf of the syndicate. The proceeds of the sales, less the usual charges for commission and other expenses, were paid by the members' firms to the syndicate. None of the appellants had previously or since been engaged in a similar transaction. It was held that the profits in question arose from a trade or business carried on by the appellants.

In *Commissioners of Inland Revenue* v. *Fraser*[13], the respondent, a woodcutter, bought a large quantity of whisky in bond in three lots in 1937 and 1938. Some two years later he sold it at a profit. This was the respondent's sole dealing in whisky. He had no special knowledge of the trade, and he did not take delivery of the whisky nor did he have it blended or advertised. His object in purchasing the whisky was to resell it at a profit. It was held that the transaction was an adventure in the nature of trade. Lord President Normand in the course of his judgment said at page 502:

"It would be extremely difficult to hold that a single transaction amounted to a trade but it may be much less difficult to hold that a single transaction is an adventure in the nature of trade. ... It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade. But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some of the cases the purchase of a picture has been given as an illustration. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it, there may be also a certain pride of possession. But the purchaser of a large quantity of commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; and I can find no single fact among those stated by the Commissioners which in any way traverses that view. In my opinion the fact that the transaction was not in the way of the business (whatever it was) of the Respondent in no way alters the character which almost necessarily belongs to a transaction like this. Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade."

The same result occurred in *Edwards* v. *Bairstow & Harrison*[14] where the respondents, a director of a leather manufacturing company and an employee of a spinning firm, bought a complete cotton spinning-plant in order to sell it in one lot as quickly as possible at a profit. They hoped to sell the plant in one lot, but ultimately had to dispose of it in five separate lots over the period from November, 1946, to February, 1948. The General Commissioners decided in the first instance that the transaction was an isolated one and not taxable. On the case being remitted to them by the Chancery Division, they decided that the transaction was not an adventure in the nature of trade. Ultimately the decision was reversed in the House of Lords on the ground that the evidence all pointed one way and that the only reasonable conclusion on the evidence was that the transaction was in the nature of trade. In coming to that conclusion the House of Lords considered the following four conditions approved by the court in *Leeming* v. *Jones*[15], one of which must be present to establish the existence of an adventure in the nature of trade: —

(i) the existence of an organisation,

(ii) activities which lead to the maturing of the asset to be sold,

(iii) the existence of special skill, opportunities in connection with the article dealt with,

(iv) the fact that the nature of the asset itself should lend itself to commercial transactions.

They found that there was an organisation in existence in the association of the two respondents and their subsequent operation. There were activities such as renovations and replacements which led to the maturing of the asset and there was search for opportunities for its sale. The machinery was in fact sold in five separate lots. One of the respondents was an employee of a spinning firm, from which it was not unreasonable to infer the existence of some skill and opportunities in connection with a cotton spinning-plant. Finally, it

was held that the nature of the asset lent itself to commercial transactions.

It is to be observed that in *Commissioners of Inland Revenue* v. *Fraser*[13] Lord President Normand drew a distinction between a purchase of land and a purchase of whisky. It would therefore be useful to consider a few decided cases on the question as to when a single transaction of purchase and sale of land may be treated as an adventure in the nature of a trade.

In *Californian Copper Syndicate (Limited and Reduced)* v. *Harris*[7], where a company, formed for the express purpose, acquired specified mining properties, and after about a year sold the whole of its assets, it was held that the resulting profit was from a trading transaction. The General Commissioners formed the view that the mining properties had been acquired by the company with the object of being resold, and in upholding their decision the court relied upon the smallness of the amount of capital which the company had available for developing the mines, and held that this fact made it manifest that the company never intended to work the mines itself, but to induce another party to purchase the mines so that the company would make a profit in that way.

In the above case the transaction was of a type which the company was authorised to carry on under its memorandum of association. It had other business and this trade was not to be dissevered from that business. The scheme for profit making was part of the general trading purposes of the company, and it was the trading or business profits which were taxable and not the transaction itself. The fact that an asset sold constitutes a company's whole undertaking can also be significant in deciding whether or not the acquisition and sale was a transaction in the nature of trade.

For some of these reasons and on the facts the decision in the above case was distinguished in *Tebrau (Johore) Rubber Syndicate, Ltd.* v. *Farmer*[16]. In this latter case the company was formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. Power was taken in the memorandum of association to sell the property and such a sale was contemplated in the prospectus issued at the inception of the company. Two estates were purchased, but the original capital being insufficient to develop them the whole of the undertaking was sold to a second company for a consideration (mainly in shares of the second company) in excess of the capital expended. At the date of the sale a considerable acreage had been planted, but no rubber had yet been produced or sold. It was held that the profit on the sale was not a profit assessable to income tax, but was an appreciation of capital. Lord Salvesen said (at pages 664, 665):

"In this case I am of opinion that the determination of the Commissioners is wrong. I am unable to distinguish the position of the Appellants from that of a person who acquires a property by way of investment and who realises it afterwards at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realises form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment."

In *Leeming* v. *Jones*[15], the taxpayer with other persons acquired two rubber estates with a view to selling them to a public company to be formed for the purpose, and he was assessed on the surplus he received out of the transaction. The General Commissioners decided that the property had been acquired with the sole object of turning it over at a profit; and that the taxpayer at no time had any intention of holding the property, or interest in property, as an investment. When the stated case came before Rowlatt J., he remitted it to the General Commissioners for them to find whether the transaction was a concern in the nature of trade. They decided that it was not, and it was held, therefore, that the assessment should be discharged. In the Court of Appeal Lawrence, L.J. said (at page 354):

"It seems to me that in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property."

This statement was approved by Lord Buckmaster and Lord Thankerton when the case went to the House of Lords.

Lord Buckmaster said at page 357:

"Can the profits made in this case be described as income? Were the Respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived: the transaction in this case stands isolated and alone. It is to my mind, in the circumstances, purely an affair of capital. I can see no difference between it and what might have happened had the Respondent bought shares in two companies which were going to be amalgamated, and then sold equivalent shares in the amalgamated company at a profit; an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. If the Crown's contention were sound the same result would have arisen had the Respondent taken shares in the company instead of cash, even though unrealised."

Viscount Dunedin at page 360 said:

"The last argument of the Counsel for the Crown was that there was a finding that the Respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments but *per se* it leads to no conclusion whatever."

In *Cooksey and Bibbey* v. *Rednall (Inspector of Taxes)*[17] the appellants in 1924 purchased a farm which they intended to occupy for the purpose of farming, and the purchase money, apart from £500 subscribed by each of them, was raised on mortgage. Subsequently they decided to let the farm at a rent which was "a good return on the investment", and in 1938, after making certain improvements including the provision of a water supply for cattle, they sold it at a considerable profit. Other activities of the appellants in connection with the developing of building estates were admitted to have been transactions in the nature of trade. The General Commissioners, while accepting the evidence

of the appellants as to their intention in purchasing the farm, decided that the transaction was in the nature of trade; but they were held to have misdirected themselves and the assessments were discharged. The basis of the decision was that the evidence that the appellants bought the farm for their own occupation, that they let it for some years, and that they sold it when they found that it had increased in value, was not contradicted by any other evidence in the case.

It is clear from the authorities that in the United Kingdom if it is desired to tax the difference between what a man has bought goods for, or property for, and sold them for, you can only tax it if you can say that what he did was a trade or adventure or concern in the nature of trade, and that there is no half-way house between a transaction which is a trading transaction and one which is a sale of capital asset (*per* Rowlatt J. in *Pearn* v. *Miller*[18]). Every case must naturally be decided on its own facts, but the crucial question is not whether the purchase was made with the intention of resale but whether the adventure was in the nature of trade.

There being no definition of the word "trade" in our Ordinance, as there is in the English Acts, it follows that a profit from an isolated transaction of purchase and resale of property, even if it is held to be an adventure or concern in the nature of trade, is not liable to income tax under section 10(1)(a) of the Income Tax Ordinance. I find support for this in the decision of the Court of Appeal in Singapore, where the charging section is in identical terms with our charging section, in the case of *D.E.F.* v. *Comptroller of Income Tax*[19], with which I respectfully agree. That was a case in which the appellant was the assistant manager of a firm trading in rubber, copra and pepper. In 1955 he received information from the wife of a neighbour that a certain rubber estate in Ipoh was for sale. Without previously inspecting the estate, he bought it on 22nd December, 1955 for $240,000 with money borrowed free of interest from his brother. His wife and his brother were shareholders in a certain limited company. His wife's brother-in-law and the neighbour referred to above were directors of the company. On 9th January, 1956 he sold the estate to the company for $485,000, having negotiated the sale though his wife's brother-in-law. He repaid the loan and invested the profit. This was an isolated dealing in land by the appellant. He was not the nominee of any person or company. Buttrose J. was of the opinion that an English court would not have found this transaction to be an adventure in the nature of trade because there was nothing else apart from the purchase and sale which stamped it with the *indicia* of trade. Rose C.J. agreed with him. But Ambrose J. was of the opinion that the transaction was an adventure in the nature of trade, and he went on to say that, in the absence of a statutory definition corresponding to the definition of "trade" in the English Income Tax Acts, it was not possible to construe trade as including an adventure in the nature of trade.

It has been argued by counsel for the appellant that the transaction in this case taken in isolation was not an adventure in the nature of trade because of the vital points of distinction between it and the transactions in the English cases on the point. His contention is that the facts here are very near the facts in *Tebrau (Johore) Rubber Syndicate, Ltd.* v. *Farmer*[16], and that the only difference between this case and the *D.E.F.*[19] case in Singapore, in which the transaction was held not to be an adventure in the nature of trade, is that here a sum of $50,000 was spent on clearing the estate. It must be borne in mind, however, that the money was spent not merely on clearing the estate but developing part of it by levelling, making roads and laying drains and sewers so as to change the character of that part of the land from rubber land to a site for a housing estate. As contended by counsel for the respondent, that part of the land had undergone modifications and adaptations to make it more readily marketable, so that at least the condition in relation to activities which lead to the maturing of the asset to be sold, which is one of the *indicia* of an adventure in the nature of trade, was satisfied. In the words of Lord Sands in *Commissioners of Inland Revenue* v. *Livingston and Others*[10] (at page 543), the subject of purchase and sale was so treated in the interval as to bring the transaction within the category of an adventure in the nature of trade. I have therefore very little hesitation in holding that the transaction in this case was an adventure in the nature of trade. But I am equally clear in my mind that, for the reasons which I have already stated, an adventure in the nature of trade is not liable to income tax under our law.

It was to overcome this difficulty of bringing an adventure in the nature of trade within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947 that section 4(a) of the Income Tax Act, 1967 was enacted to provide for income tax to be chargeable upon income in respect of "gains or profits from a business for whatever period of time carried on", and "business" was defined in section 2 of the Act to include "profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment". There is some presumption that a statute passed to amend the law is directed against defects in the old law. Lord Macmillan in giving the opinion of the Judicial Committee in *D. R. Fraser and Co., Ltd.* v. *Minister of National Revenue*[20] said:

> "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation it is far from uncommon to find amendments introduced at the instance of the revenue department to obviate judicial decisions which the department considers to be attended with undesirable results."

To my mind, that is exactly what has happened here. The new Act in fact repeals the Ordinance. It has been argued by the counsel for the respondent that the draftsman of the 1967 Act might well have been too meticulous in that he wanted to make clearer what was already clear in the Ordinance without any intention of changing the meaning. I do not agree. In my judgment this is not a case in which it can be said, in the words of Viscount Haldane, L.C. *In Re Camuel*[21], that "the later Act may have been designed, *ex abundante cautela*, to remove possible doubts".

The third question which the Special Commissioners considered was whether the appellant was carrying

on a business of dealing or trading or trafficking in land. They answered this question in the affirmative and it was on that ground that they found the appellant liable to pay income tax. They found support for their finding in the following *dictum* of Ambrose J. in the case of *D.E.F.* v. *Comptroller of Income Tax*[19] (at page 61):

"I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention, then he has carried on a business."

Their reasons for the conclusion that the appellant was carrying on a business of trafficking in land are to be found in the following passage in their grounds of decision: —

"In the present case, the appellant agreed with four other persons in December 1957 to purchase the estate, and at the beginning of 1958 the appellant approached his accountants with a view to forming D Company Limited, and one of the declared objects as contained in paragraph 3(4) of its memorandum of association, is to traffic in land. The appellant and other co-owners paid the purchase price of the estate on 28.2.58. It appears that the Appellant took an active part in the formation of D Company Limited as he was one of the two subscribers to the memorandum and articles of association of the company. From these facts we find it reasonable to infer that at the time of purchasing the estate the appellant had the intention to traffic in land and that when he transferred his interests in the estate at a profit he did so with the intention of carrying on the business of dealing in lands, first as an individual member of a syndicate and then as a shareholder in D Company Limited. Since at about the same time as he purchased the estate he actively participated in forming a company with the object of carrying on the business of dealing in lands, we find it difficult to believe that the appellant did not intend to carry on the same business when he purchased the estate jointly with four other persons. The fact that the said land which was only 2 miles away from a town possessed great potential value and that the appellant and the co-owners paid a price higher than the then prevailing price for rubber land (paragraph 2 of Annexure A) are evidence tending to show that the syndicate at the time of purchase, intended to embark on the business of speculative land deals, although the co-owners might have the incidental intention of using it as an investment. The fact that there is no evidence to show that D Company Limited ever sold any piece of land should not affect the inference, as the declared object of the company to traffic in land is there. This inference of the appellant's intention to deal in lands as a business is confirmed by the purchases and sales of other lands by him. The Appellant admitted (see paragraph 1 of Annexure A) that he acquired land before the war and sold 7 lots of the land in 1952, that he bought 78 acres of rubber land at Ulu Klang in 1949 and sold it in 1964 and that he bought 187 acres of rubber land in 1951 and sold it in 1960."

They go on to say in their grounds of decision that, even without resorting to the *dictum* of Ambrose J., all the transactions of buying and selling other lands by the appellant, together with this transaction of buying D Estate and selling it to D Company Limited, were repeated acts of buying and selling lands sufficient to constitute the carrying on of the business of dealing and trading in lands. They then cited the case of *Pickford* v. *Quirke*[22] in support of their finding.

To take first this last reason for the finding of the Special Commissioners that the transaction by the appellant in this case constituted the carrying on of business within the meaning of section 10(1)(a) of the Ordinance, I must say that the case of *Pickford* v. *Quirke*[22], far from supporting their finding, negatives it. The decision in that case turned on the principle that an important element in deciding whether or not a trade is being carried on is whether there have been repeated transactions of the same kind. The facts in that case were as follows. A director of a spinning company formed a syndicate for the purpose of purchasing the shares of a mill-owning company and causing the company to sell its assets to another company. He then engaged in three similar transactions but with different associates. It was held that his participation in the four transactions constituted a trade and that he was assessable in respect of his share of the profits. Rowlatt J. in the High Court said at page 263:

"Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade."

When the case went up to the Court of Appeal Lord Hanworth M.R. expressed the same opinion when he said at page 269:

"Now you may have an isolated transaction so independent and separate that it does not give you any indication of carrying on a trade. It must be remembered that under the interpretation clause trade 'includes every trade, manufacture, adventure or concern in the nature of trade'. When, however, you come to look at four successive transactions you may hold that what was, considered separately and apart, a transaction to which the words 'trade or concern in the nature of trade' could not be applied, yet when you have that transaction repeated, not once nor twice but three times, at least, you may draw a completely different inference from those incidents taken together. That is what the commissioners have done."

Sargant L.J. laid emphasis on the close proximity to one another of the four transactions when he said at pages 274 and 275:

"The commissioners, carefully distinguishing between the case of a single transaction and the case of a series of transactions which together might or might not amount to a carrying on of a business, and taking the view that whether that was so or not was a question of degree, have come to the conclusion that four transactions of the kind in close proximity to one another were a sufficient series of transactions to make what Mr. Pickford did into a trade or business for which he might be chargeable for Income Tax and for Excess Profits Duty. . . . . It seems to me perfectly simple and straightforward to come to the conclusion that one transaction was not in itself a carrying on of a trade or business, and yet on the other hand to take the view that the share of an individual in that transaction together with a number of other transactions might well constitute the carrying on of a trade or business."

In dealing with this point, the learned judge in the court below said:

"When one looks at the facts in the case of *Pickford* v. *Quirke*[22], one finds that the repeated transactions which brought the tax-payer within the provisions of the Income Tax Act were transactions that followed fairly closely one after the other. . . . . On the facts of this case, it will be seen that the repeated acts of buying and selling occurred within a certain period of time which was of comparatively narrow compass."

He then referred to the passage in the judgment of Sargant, L.J. which I have cited above and then cited the following passages from the judgment of Lord Carmont in *Commissioners of Inland Revenue* v. *Reinhold*[23]:

"A transaction does not require to be unique in the life experience of a businessman to be treated as isolated. In ordinary parlance a thing is isolated when it is placed apart from some other thing."

"... certain transactions shew inherently that they are not investments but incursions into the realm of trade or adventures of that nature. .... This means that, although in certain cases it is important to know whether a venture is isolated or not, that information is really superfluous in many cases where the commodity itself stamps the transaction as a trading venture, and the profits and gains are plainly income liable to tax."

The conclusions at which the learned judge arrived on the question as to whether the purchases and sales of other properties by the appellant in this case could be taken into consideration for the purpose of deciding whether he was carrying on business are stated in his grounds of judgment as follows: —

"It appears to me therefore that before repeated acts are linked together to fasten liability for income tax purposes, they must be related by the time factor to one another. If I am right, then it follows that I must conclude that the previous dealings in land by the appellant do not, *per se*, characterise the dealing in question as a trade or business or as carrying on a business of dealing in land. I am not advised, on the facts as listed, that the previous dealings were caught for income tax purposes but I think it is quite clear from the length of the holdings and from the description of the appellant as a rubber planter, that his profession, his business or occupation, in these holdings was that of a rubber estate owner and planter and not a trafficker in land.

"In my view, therefore, I do not think that the previous dealings in land so-called by the appellant fastened on the present dealing the characteristics of a repeated act. Since the present dealing is placed so far apart from the previous dealings, it is, in my view, for the purpose of income tax liability an isolated dealing."

"I take the view, therefore, that in this case the transaction remains to be considered apart from the other dealings in land by the appellant and that the question whether the profits or gains were income caught by the Ordinance is to be decided in the light of the facts attendant on the purchase and sale."

I would adopt with respect those conclusions of the learned judge as the only reasonable conclusions on the question. It is to be observed that before the purchase of D Estate the appellant had bought three other rubber estates. He held on to the first rubber estate for more than 12 years and that was the only estate which he had sold prior to the sale of D Estate to D Company, Limited. His other two estates were bought in 1949 and 1951 and they were sold in 1964 and 1960 respectively. I fail to see, therefore, how it can possibly be argued that his four transactions were in such close proximity to one another so as to constitute a series of transactions to make what he did into a "business" for which he can be chargeable for income tax under section 10(1)(a) of the Ordinance.

Coming next to the clause in the memorandum of association of the company, on the basis of which the Special Commissioners drew the inference that at the time of purchasing the estate the appellant had the intention to traffic in land and that when he transferred his interest in the estate at a profit he did so with the intention of carrying on of the business of dealing in land, first as an independent member of a syndicate and then as a shareholder in D Company, Limited, I would refer to the following passage from the majority judgment of the High Court of Australia in *Ruhamah Property Co., Ltd.* v. *Federal Commissioners of Taxation*[24]:

"In our opinion the authorities show that the objects and powers of the Company contained in its memorandum and articles of association are not decisive of the question whether the sale was an operation of business in carrying out a scheme of profit-making, but that a consideration of all the matters advanced by the Company was relevant to a determination of that question."

The question is not what business does the taxpayer *profess* to carry on, but what business does he *actually* carry on (per Lord President Clyde in *Commissioners of Inland Revenue* v. *Hyndland Investment Co., Ltd.*[25]) The learned Lord President asked in that case, "What then has the company done?" In answering that question he said: "It has completed the development begun by the syndicate, and covered the land it acquired with house property. It seems to have done that shortly after its acquisition of the land, ..." By sheer coincidence, that is what has happened in the case before us. The fortunes of the respondent company in that case were not favoured by circumstances, with the result that the company found it expedient to ease its circumstances by selling a considerable part of the property over a period of five or six years. No such misfortune has befallen the company in the present case, so that it has not been obliged to sell any of its property. The question raised in that case was whether the respondent company carried on business of dealing in land and house property, or whether its business was that of owning, improving and factoring house property. That question was answered in the negative. Can the answer in this case be any different? I do not think so. As Lord Sands said in *Commissioners of Inland Revenue* v. *The Scottish Automobile and General Insurance Co., Ltd.*[26], "it is not legitimate to treat every object specified in the preliminary documents as indicatory of an intention to carry on a certain class of business as one of the purposes for which the company was formed".

The clause in question, to my mind, is one of the so-called inflated-objects clauses in conformity with the modern practice of putting in the memorandum all possible and conceivable objects of the company, which arose, following the decision of the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche*[27], to avoid the cumbersome procedure of altering or extending the company's objects in accordance with statutory provisions. This practice was criticized by the House of Lords in *Cotman* v. *Brougham*[28], but it was held to be effective in excluding the "main objects" rule of construction. I need hardly add that in this case the clause in question is not the main or the only clause in relation to the objects of the company. Moreover, we are not concerned here with a transaction by the company but by the appellant. Although the appellant was one of the two subscribers to the memorandum and articles of association of the company and is its major shareholder, it would be wrong to impute to him at the time of the purchase of the D Estate the intention of the company several months later. The utmost that could be said from all the surrounding circumstances is that the appellant bought D Estate with the object of selling it to the company. That alone is not sufficient to justify the in-

ference that right from the beginning he intended to carry on a business of trafficking in land. An important point to bear in mind is that the company up to now has taken no steps whatsoever to sell any part of the land.

It is a trite law that a company is a separate legal entity from the appellant. But the state of mind of the company is also the state of mind of the persons who run the company. This is what Lord Denning said on the subject in the case of *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.*[29]:

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in a case where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."

It was contended by counsel for the respondent that the converse is also true, so that the commissioners were right in imputing the intention of the company to the appellant. The question, however, is whether they had correctly imputed the intention of the company to the appellant. The answer to that question, to my mind, must be in the negative, because, as I have already stated, they were imputing the intention of the company at the time of its incorporation to the appellant at the time of the purchase of D Estate some fifteen months earlier. As there were other objects of the company, singling out one of them for the inference that the appellant intended to carry on business was to ignore the other objects altogether. In any event, we are not concerned with the intention of the company. What we are concerned with is the intention of the appellant long before the company was formed. Even if the intention of the company can be imputed to the appellant, is there any evidence that the company did in fact traffic in land? There certainly is not. That takes me back to what I said earlier that the objects and powers of the company contained in its memorandum and articles of association are not decisive of the question. The object of the company on which the Special Commissioners relied is therefore wholly irrelevant to the determination of this appeal.

There is no validity either in any of the other reasons given by the commissioners for their inference as to the alleged intention of the appellant to carry on business. It may well be that the appellant and his co-owners paid a higher price than the then prevailing prices for rubber land. One of the probable reasons for the high price was the potential value of the land by reason of its proximity to Seremban town, in that it was a good investment. Would not the purchase of rubber land so close to a town with all its inherent potentialities be equally, if not more, consistent with its having been bought as an investment rather than by way of embarkation on a business of speculative land deals? It is clear from the evidence that the purchasers never had any intention of sub-dividing the land with a view to selling it piecemeal. The commissioners said that the fact that D Company Limited never sold any piece of land should not affect the inference as to the intention to carry on business, because the declared object of the company to traffic in land was there. I must say again that that object of the company which the Commissioners chose as a convenient peg on which to hang all their arguments is not decisive of the matter. They went on to say that this inference of the appellant's intention to deal in land as a business is confirmed by the purchases and sales of other lands by him. I have already said that the purchases and sales of other lands by the appellant are wholly irrelevant. Although the appellant had purchased three other lands previously he had sold only one of them. That land was sold five years earlier, and it had been bought more than sixteen years before the purchase of D Estate. The result then is that this appeal must be decided on the basis of an isolated transaction of purchase and sale of a rubber estate by the appellant.

That brings me to the crucial question to be decided in this appeal, namely, whether this isolated transaction constituted the "carrying on" of a "business' within the meaning of section 10(1)(a) of the Ordinance? There is a plethora of authorities as to the meaning of the word "business" when it is used in conjunction with the words "carry on". I propose to cite only a few of them. In *Erichsen* v. *Last*[30] Cotton L.J. said that "when a person habitually does a thing which is capable of producing a profit for the purpose of producing a profit and enters into a contract habitually, he is carrying on a trade or business." In *Smith* v. *Anderson*[31] Brett L.J. said: "The expression 'carrying on' implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business." That *dictum* of Brett L.J. was cited with approval by the House of Lords in *Kirkwood* v. *Gadd*[32] in which Lord Atkinson said that "the words 'carries on' must be held to imply a repetition of acts, the sum of which constitutes the 'business'." In *Commissioners of Inland Revenue* v. *Marine Steam Turbine Co.*[33] Rowlatt J. said:

"It has been said on behalf of the appellants that the word 'business' is a very wide word. That word, in whatever sense it be understood, is undoubtedly an elastic word capable of wide extension; but it must be borne in mind that it is also a word which has two virtually distinct meanings. It may mean any particular matter or affair of serious importance."

"The word 'business', however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned. I have therefore to ask myself whether the respondent company is carrying on a 'business' in this latter sense."

The main contention of counsel for the respondent in support of the Special Commissioners' decision is that the word 'business' is wide enough to include an adventure in the nature of trade, and that if that word is considered in conjunction with the phrase "for whatever period of time such trade, business, profession or vocation may have been carried on or exercised" then it need not necessarily refer to continuous activi-

ties. He has cited the case of *St. Aubyn Estates, Ltd.* v. *Strick*[34] in support of this contention, but I do not think that that case supports any such proposition. The sheet anchor of his argument is the decision in the Kenya case of *H. Co., Ltd.* v. *Commissioner of Income Tax*[35] in which it was held by Windham J. that the profits from a single business transaction were liable to income tax under section 7(1)(a) of the Kenya Income Tax Ordinance, which is in identical terms with section 10(1)(a) of our Ordinance and the Singapore Ordinance. This is what Windham J. said in that case at page 72:

"It is true that the expression 'business' pure and simple is more frequently applied to the habitual transaction of trade or commercial or financial transactions having particular features in common according to the nature of the business; but the word is in my view wide enough to embrace a single trade or commercial or financial transaction, although such a single transaction is more commonly spoken of not as a business simpliciter but as a piece of business or a business transaction."

The Kenya case I have just mentioned was considered in *D.E.F.* v. *Comptroller of Income Tax*[19] in which both Buttrose J. and Ambrose J. disagreed with Windham J.'s interpretation of the word 'business', with which opinion Rose, C.J. agreed, and the court decided accordingly that the purchase and sale of the rubber estate in that case did not constitute a trade or business of the appellant so as to make the profit arising therefrom subject to income tax under section 10(1)(a) of the Income Tax Ordinance. Ambrose J., however, expressed the opinion that the decision in the Kenya case was right on the facts. The facts in that case were that the appellant company, a holding company with power under its memorandum of association to acquire, sell and dispose of any property and any business and to carry on any business so acquired, purchased an estate with a view to resale. It had previously and subsequently operated as a holding company. The estate was divided into four parts and sold to four different purchasers over a period of approximately 18 months.

In *D.E.F.* v. *Comptroller of Income Tax*[19] Buttrose J. having observed that there was no definition of 'business' in the Singapore Ordinance and having reviewed a number of authorities in relation to the meaning of that word, said at page 59:

"Now the word 'business' in section 10(1)(a) of the Ordinance is used in association with 'trade', 'profession' or 'vocation', all of which connote habitual and systematic operations, a continuity or repetition of acts or similar operations. Taking the Ordinance as a whole there can be no doubt that the business must be carried on and section 10(1)(a) clearly implies it. The term 'business' as used in the section does not apply to one isolated act; it does not mean a 'business transaction' ".

Speaking of the decision of Windham J. in the Kenya case, he said:

"... he failed to appreciate that the business must be carried on. He does not appear to have been referred to or considered any other Commonwealth legislation or authority on the point and his decision runs counter to all the cases in other Commonwealth countries on the subject. 'Business' does not mean 'business transaction' unless the legislature says so. The word 'transaction' is not included after the word 'business' in section 10(1)(a) and it could and should have been if that was the intention of the legislature. It cannot be read into the section."

In this connection he referred to the *dicta* in the *Ormond Investment Company, Ltd.* v. *Betts*[36], *Coltness Iron Company* v. *Black*[37] and *Jackson's Trustees* v. *Lord Advocate*[38] to the effect that the imposition of a tax must be in plain terms, that the subject ought not to be involved in tax liabilities by an elaborate process of hair-splitting arguments, and that the court cannot give effect to an argument which requires it to read any word into a taxing Act for the purpose of making the incidence of taxation heavier on an individual. Ambrose J. expressed his opinion in the following words at page 61:

"In my view, the fundamental idea underlying the three words 'trade, ... profession or vocation' in section 10(1)(a) of the Singapore Income Tax Ordinance is the continuous exercise of an activity. Considering the context, it seems to me that the same fundamental idea underlies the word 'business' which appears between the word 'trade' and the words 'profession or vocation'; and that the word 'business' must, therefore, be given its ordinary meaning, namely, an occupation habitually engaged in, especially for livelihood or gain. If the word 'business' is wide enough in the context under consideration to include anything which occupies the time, attention and labour of a man for the purpose of profit, there would be no need to mention trade, profession or vocation. Reading section 10(1)(a) with section 35(3) and 35(5), I take the view that the business from which the profit is derived has to be a business which has been carried on. The phrase 'carried on' implies a repetition or series of acts and confirms the fundamental idea of the continuous exercise of an activity. If my view of the meaning of the word 'business' in its context is right, I do not see how it could be construed to include an adventure in the nature of trade, in the absence of any statutory provision corresponding to the definition of business in section 2 of the Indian Income Tax Act, which states that 'business' includes 'any trade, commerce, or manufacture, or any adventure or concern in the nature of trade, commerce, or manufacture'. That seems to me to be no more possible than to construe 'trade' as including an adventure in the nature of trade, in the absence of a statutory definition corresponding to the definition of 'trade' in the English Income Tax Act, which states that 'trade' includes an adventure in the nature of trade. For the above reasons I come to the conclusion that the appellant derived a profit from a business transaction carried out by him but not from a business carried on by him."

I agree most respectfully with the decision and the reasonings of Buttrose and Ambrose JJ. in *D.E.F.* v. *Comptroller of Income Tax*[19]. I can do no better than to adopt whatever they said. It would be futile for me to say the same thing in different words in relation to the case before us. The facts in this case differ so as to make the transaction here an adventure in the nature of trade, which it was not in that case. But, in so far as the question as to whether the transaction was a part of the business carried on by the appellant is concerned, the answer in this case must be in the negative as it was in that case, because as in that case the appellant here derived a profit from a business transaction carried out by him and not from a business carried on by him. The facts in this case are obviously so materially different from the facts in the Kenya case of *H. Co., Ltd.* v. *Commissioner of Income Tax*[35] that it would be wrong to follow that case even if it was correctly decided on the facts, as opined by Ambrose J. in the *D.E.F.* case[19].

I think there is also a lot of substance in the argument put forward by counsel for the appellant that the transaction here amounted to nothing more than an exchange of one form of assets into another form. The

appellant and his co-owners held the estate in partnership in unequal shares. The partnership of course was not a separate legal entity from its members, but the erstwhile partners became the only shareholders, to the extent of their shares in the partnership, in the company to which the assets of the partnership were transferred, there being no outside shareholders in the company. The position then was that whereas formerly the partners had direct ownership of the estate, with the formation of the company they retained ownership indirectly through their shares in the company. In other words, shares in the land became shares in the company which became the registered owner of the land.

In the final analysis the answer to this appeal is fairly simple. The transaction by the appellant in this case must be taken as an isolated transaction. As an isolated transaction, it was an adventure in the nature of trade. In the absence of a definition of "trade" extending that term to an adventure in the nature of trade, as the English Income Tax Acts do, this single transaction did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it was but a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of the same section. The profit arising therefrom is therefore not subject to tax under that section.

In the result, I would allow the appeal with costs here and in the court below, reverse the judgment of the High Court, annul the assessment made by the Comptroller of Income Tax and order a refund of the income tax paid by the taxpayer under the assessment.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Yeo & Yeo.*

PENGURUS WILAYAH UTARA, BAHAGIAN KENDERAAN MARA, KEDAH v. HASNAH

[O.C.J. (Wan Suleiman J.) June 25, 1970]

[Alor Star — Civil Appeal No. 13 of 1969]

Master and Servant — Maternity allowance — Employer — Whether MARA an employer under the Employment Ordinance, 1955, s. 37 — Majlis Amanah Ra'ayat Act 1966, s. 39(2).

The respondent in this appeal claimed before the assistant state commissioner for labour for maternity allowance at the rates prescribed in the Employment Ordinance, 1955. The appellant contended that MARA was not an employer under that Ordinance, it being a Government body, and that section 37 of the Ordinance governing maternity allowance payable to female employees did not apply to employees of MARA. The assistant commissioner rejected this argument and gave judgment for the respondent.

The main issue at law to be decided was whether MARA could superimpose upon the terms of service of its employees the provisions of Cap. C. of the General Orders of Malaysia and regulations made under the MARA Act to the exclusion of the appropriate provisions of the Employment Ordinance.

Held, dismissing the appeal: MARA is merely a statutory corporation. Nowhere in the Majlis Amanah Ra'ayat Act is there any manifest provision which would tend to indicate that Parliament intended to repeal, alter or derogate from the special provisions of the Employment Ordinance 1955.

Cases referred to:-

(1) *Seward* v. *The Vera Cruz* [1884] 10 A.C. 59 at p. 68.

(2) *Barker* v. *Edger & Ors.* [1898] A.C. 748 at p. 754.

CIVIL APPEAL.

Narayanan for the appellant.

Respondent in person.

Cur. Adv. Vult.

Wan Suleiman J.: This is an appeal against the decision of the assistant state commissioner for labour.

The respondent an employee of Majlis Amanah Ra'ayat (MARA) commenced work on February 1, 1966 as a clerk for the appellant. Her claim before the assistant state commissioner was for maternity allowance at the rates prescribed in the Employment Ordinance, 1955. The Pengurus Wilayah Utara of MARA who appeared at that hearing on behalf of the appellant contended that MARA was not an employer under the Employment Ordinance, 1955 being a Government body, and among other things he contended that section 37 of the Employment Ordinance, 1955 governing maternity allowance payable to female employees under the Ordinance does not apply to employees of MARA and that instead the provisions of Chapter C. Order 17 of the General Orders of Malaysia are applicable. The assistant state commissioner rejected this argument and gave judgment to the respondent.

At the hearing of the appeal Mr. Narayanan for the appellant raised two grounds of appeal. First he urged that under section 39(2) of the Majlis Amanah Ra'ayat Act 20 of 1966 all rules and regulations made under the provisions of the Rural and Industrial Development Authority (RIDA) Ordinance, 1953 in force immediately before the coming into force of the MARA Act insofar as they are not inconsistent with the provisions of that Act shall be deemed to have been made under the Act and shall continue in force until other provisions are made under the Act or until the date upon which they expire. He produced a circular, RIDA circular No. 12 of 1964 which he conceded was a departmental circular but which he contended would govern the contract of service of employees of MARA by virtue of section 39(2) of the Act earlier referred to.

He also referred to section 16 sub-section (1) of the RIDA Ordinance, 1953 which empowered that authority to employ *inter alia* such officers and servants as may be necessary for the purposes of that Ordinance, and to section 51(g) of that Ordinance which empowered the Rural and Industrial Development Authority with the appropriate approval to make regulations not inconsistent with the provisions of the Ordinance generally for the exercise of their powers and duties under the provisions of that Ordinance. I was asked to regard RIDA circular No. 12 of 1964 which it was conceded was never gazetted and therefore is not subsidiary legislation made under that Ordinance,